IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-694

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Petitioner,

—against—

GREYHOUND COMPUTER CORPORATION, INC.,

Respondent.

PETITIONER'S REPLY MEMORANDUM

THOMAS D. BARR,
ALAN J. HRUSKA,
ROBERT F. MULLEN,
One Chase Manhattan Plaza,
New York, N. Y. 10005
NICHOLAS DEB. KATZENBACH,
Old Orchard Road,
Armonk, New York 10504
LLOYD N. CUTLER,
JOHN H. PICKERING,
JAMES S. CAMPBELL,
1666 K Street, N.W.,
Washington, D. C. 20006
Attorneys for Petitioner International Business Machines Corporation

Of Counsel:
EVAN R. CHESLER,
CRAVATH, SWAINE & MOORE,
One Chase Manhattan Plaza,
New York, N. Y. 10005
A. DOUGLAS MELAMED,
WILMER, CUTLER & PICKERING,
1666 K Street, N.W.,
Washington, D. C. 20006

December 23, 1977.

TABLE OF CONTENTS

TABLE OF CASES

IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-694

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Petitioner,

—against—

GREYHOUND COMPUTER CORPORATION, INC.,
Respondent.

PETITIONER'S REPLY MEMORANDUM

Greyhound's Brief in Opposition demonstrates why this petition should be granted. First, it effectively confesses the errors of the opinion below. Secondly, it highlights the importance to antitrust law and to our competitive enterprise system of correcting those errors now.

1. THE BRIEF IN OPPOSITION EFFECTIVELY CONFESSES THE ERRORS OF THE COURT BELOW.

IBM's petition herein presents four principal questions for review by this Court. In its Brief in Opposition, Greyhound makes but little effort either to respond to those questions or to defend the reasoning of the court below, though it enthusiastically embraces the result. When Greyhound does attempt to defend the decision below, it exposes its fallacies.

(a) *The Lease-Market/Purchase-Market Distinction.*

IBM urges that the court below wrongly held that a jury could define a submarket for leasing computer equipment, separate from a submarket for the sale of identical equipment by the same manufacturers to the same customers. We pointed out that plaintiff offered no evidence of any barriers preventing firms: from both leasing and selling (as they in fact do); from readily changing the terms and conditions of each as demand shifts; or from entering the lease "submarket" (as in fact many did). *See* petition, at pp. 2, 10-12, 20-27, esp. 22-26.

Greyhound totally fails to address that question. Not only has Greyhound decided not to try to defend the market definition that puts sales and leases into separate submarkets, but in a rush to remind the Court of IBM's 1956 Consent Decree, Greyhound in effect urges the obvious fact that lease and purchase are competitive alternatives, thereby completely undercutting the holding below.* (Br. Opp., at pp. 4-5)

(b) *The Significance Of IBM's Market Share.*

IBM contends that the court below erred in holding that a jury could find that IBM possessed monopoly power essentially because of its large share of the narrow leasing "submarket", notwithstanding the sharp decline in that share and the clear presence of other indicia of effective competition. *See* petition, at pp. 2-3, 12, 27-32.

Greyhound responds only with obvious diversions. Rather than discuss the significance of IBM's rapidly

*Similarly, in a case arising under the banking laws, another panel of the Ninth Circuit has recently concluded that leases and sales financed by secured loans are "functionally interchangeable" means of financing the acquisition of equipment. *See M&M Leasing Corp. v. Seattle First National Bank*, ___ F.2d ___ (9th Cir., Nov. 4, 1977). Indeed, Greyhound itself urged to the court below that certain kinds of lease transactions are identical to certain kinds of sale transactions. *See* petition, at p. 11*.

declining share of the court's submarket, Greyhound prefers to offer patently flawed tables purporting to show IBM's "share" of other, different aggregations of revenues, profits or machines (Br. Opp., at pp. 8, 17; app., at pp. 1a-3a). Those substitute aggregations are so far removed from this case that most of the tables do not even include Greyhound and other leasing companies in the calculations. (Br. Opp., at p. 17; app., at pp.1a-3a)

(c) *The Acts Of Monopolization.*

IBM contends that the court below wrongly held that a jury could find that IBM's pricing of its products and services was unlawful monopolizing conduct, even though the prices were not below cost or in some way "predatory", but because they "unnecessarily" made profitable operations by Greyhound less profitable. *See* petition, at pp. 3, 12-15, 32-36.

Here, Greyhound does not meet the issue we raise, but it does embrace the court's result: "The use of ordinary business practices to maintain the monopoly is unlawful." (Br. Opp., at p. 11) That statement accurately summarizes the holding of the court below and lays bare its fallacy.* Greyhound recognizes that the decision

*Greyhound purports to rely for that proposition on *United States* v. *United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U. S. 521 (1954) and *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359 (1927). Both cases are wholly inapposite:

United Shoe involved: a defendant which possessed 85% or more of the market for 40 years (110 F. Supp. at 307, 339); an industry in which there were no significant competitors and only one significant entrant in nearly 40 years (*id.* at 307-12, 339); a stagnant industry with little or no technological change in three decades or more (*id.* at 331); and a defendant whose position was largely accounted for by the exclusive use of mandatory, 10 year leases with cancellation charges which were increased if a competitive machine was installed (*id.* at 320, 324-25; *see also* petition, at p. 32*)

Eastman Kodak, far from bearing a "striking" similarity to this case as Greyhound asserts (Br. Opp., at p. 10), involved

below simply makes it unlawful *per se* for any firm with a substantial share of some submarket to continue competing with its rivals. Whether such a rule should ever become the law is peculiarly for this Court to decide.

(d) *The Elements Of The Offense Of Attempt To Monopolize.*

IBM urges that the court below erred in adhering to a Ninth Circuit rule—which squarely conflicts with decisions of every other circuit—that a plaintiff may go to a jury with an attempted monopolization claim without any definition or evidence of a relevant market or a dangerous probability that defendant will succeed in monopolizing that market. *See* petition, at pp. 3, 15-16, 36-40.

Greyhound freely acknowledges the conflict with other circuits, which as Greyhound admits, use "different legal tests". (Br. Opp., at p. 20) Yet Greyhound would have this Court leave standing the Ninth Circuit's unique rule, because it says this Court has denied petitions for certiorari in four other Ninth Circuit cases involving the same attempted monopolization test. In fact, only one of the four cases cited by Greyhound presented a split among some circuits to this Court for resolution—and that case was *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U. S. 993 (1964) which first

---

monopolization which was, in this Court's words, brought about by:

> "purchasing and acquiring the control of competing companies engaged in manufacturing [photo] materials, and the businesses and stock houses of dealers; by restraining the vendors from re-entering these businesses; by imposing on the dealers to whom it sold goods restrictive terms of sale fixing the prices at which its goods could be resold and preventing them from handling competitive goods; and by other means of suppressing competition." 273 U.S. at 368

enunciated the Ninth Circuit rule, and which was decided long before most of the conflicting decisions in all other circuits and before this Court's decision in *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172, 177 (1965).*

Greyhound's other suggested basis for denying IBM's petition with respect to the attempt question is that "[i]t is really an alternative issue" raised by the court below (Br. Opp., at p. 21). Far from an "alternative issue", it is a separate, distinct and independent holding of the court below. It is a holding that states an independent standard of liability under Section 2 of the Sherman Act which applies, in Greyhound's own words, "without evidence of monopoly, without evidence of the dangerous probability of monopolization and without evidence of a relevant market." (Br. Opp., at p. 20)**

---

*Greyhound did not cite another Ninth Circuit case which applied the *Lessig* rule and in which a petition for certiorari was denied. In that case, *Treasure Valley Potato Bargaining Ass'n* v. *Ore-Ida Foods, Inc.*, 497 F.2d 203 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974), the parties likewise failed to raise the split among the circuits with respect to attempted monopolization in their briefs to this Court.

In addition, this Court has denied certiorari in a number of cases from circuits other than the Ninth Circuit where the petitioner sought to apply the Ninth Circuit's rule that the offense of attempted monopolization does not require definition or proof of a relevant market or a dangerous probability of success. *See, e.g., United States* v. *Empire Gas Corp.*, 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977); *E. J. Delaney Corp.* v. *Bonne Bell, Inc.*, 525 F.2d 296 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976); *Agrashell, Inc.* v. *Hammons Prods. Co.*, 479 F.2d 269 (8th Cir.), *cert. denied*, 414 U.S. 1022 (1973).

**Incredibly, Greyhound also suggests that this Court should not now consider the attempted monopolization question because "we cannot assume at this time what [the district court's] charge will be". (Br. Opp., at p. 21) That is, according to Greyhound, it should not be assumed that the district court will adhere to the legal test enunciated by the Ninth Circuit.

2. THE BRIEF IN OPPOSITION DEMONSTRATES THE IMPORTANCE OF DECIDING NOW THE QUESTIONS PRESENTED BY THE DECISION BELOW.

Greyhound asks this Court not to review the decision below because it is "in the nature of an interlocutory appeal". (Br. Opp., at p. 21) After all, Greyhound argues that the court of appeals has merely decided that it is entitled, on the evidence canvassed in the opinion below, to go to the jury and get a verdict.

But it is precisely that decision—that Greyhound has made out a case for the jury—which is so wrong, so fraught with anticompetitive consequences and so productive of unnecessary, wasteful litigation:

> —If the law is that the critical attribute of a market in which defendant can have power is proof of the existence of barriers to entry into that market, as it is, then why should a plaintiff get to the jury without offering any evidence of such barriers?
>
> —If the law is that market share is not the exclusive indicator of monopoly power, as it is, then why should a plaintiff get to the jury when, on the evidence, that indicator shows a rapid, sharp decline and other indicators point to a highly competitive, non-monopolized market?
>
> —If the law is that antitrust rules protect competition, not competitors, as it is, then why should a plaintiff get to the jury when his only complaint about the defendant's competitive practices is that they "unnecessarily" affected him?
>
> —If the law in ten of the federal judicial circuits is that two critical elements of the offense of attempted monopolization are a market in which the attempt occurs and a dangerous probability of the attempt succeeding, as it is, then why should a plaintiff in one circuit be able to get to the jury without evidence of either element?

Why, indeed, unless it is desired to increase antitrust litigation by sacrificing rules of law based on economic principles and commercial realities to give every possible plaintiff an opportunity for a jury verdict? Why, indeed, unless it is desired that a smaller competitor, less successful in competing than it would have liked,* is entitled for that reason alone to have a jury decide that a larger, more successful competitor is guilty of monopolization or attempted monopolization and must therefore pay it three times the profits it had hoped to make?

In short, under the judgment of the court of appeals, if defendant does anything which a jury could find to be "unnecessary", that jury may decide that defendant is guilty of monopolization or an attempt to monopolize.

That is the position shamelessly advanced in the Brief in Opposition. It is also the hidden agenda that informs every paragraph, and undergirds every holding, of the opinion below: small companies shall routinely bring larger ones before juries for "antitrust" judgments unconstrained by sound principles of law or economics.

That fundamental error of the decision below should be corrected now because this case sharply raises the question of what proof an antitrust plaintiff must offer

---

*But far more successful than it would have this Court believe. Greyhound five times (Br. Opp., at pp. 2, 6, 7, 11; app., at p. 9a) characterizes what has happened since the trial by stating that it is "unable to purchase IBM computers" or is liquidating its business. We show in a brief appendix that Greyhound has purchased since the trial, and is purchasing, very substantial volumes of IBM computers.

before he is entitled to have a jury revise, perhaps devastatingly, the results of the marketplace. If that error is not corrected now, unnecessary and wasteful litigation will be spawned by allowing jury trials to proceed on such mistaken premises.

CONCLUSION

This Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

THOMAS D. BARR,
ALAN J. HRUSKA,
ROBERT F. MULLEN,
One Chase Manhattan Plaza,
New York, N. Y. 10005
NICHOLAS DEB. KATZENBACH,
Old Orchard Road,
Armonk, New York 10504
LLOYD N. CUTLER,
JOHN H. PICKERING,
JAMES S. CAMPBELL,
1666 K Street, N.W.,
Washington, D. C. 20006
Attorneys for Petitioner
International Business Machines
Corporation

Of Counsel:
EVAN R. CHESLER,
CRAVATH, SWAINE & MOORE,
One Chase Manhattan Plaza,
New York, N. Y. 10005
A. DOUGLAS MELAMED,
WILMER, CUTLER & PICKERING,
1666 K Street, N.W.,
Washington, D. C. 20006

December 23, 1977.

APPENDIX

APPENDIX

Greyhound, in its Brief in Opposition, makes the following statements:

> ". . . IBM planned to *and eliminated* the leasing companies" (p. 2; emphasis supplied)
>
> ". . . IBM eliminated computer purchases" (pp. 6-7)
>
> "Since early 1969, Greyhound has simply been unable to purchase IBM computers and, as the chief executive officer of Greyhound observes in his testimony, Greyhound since that time has simply been 'liquidating its inventories.' " (p. 7)
>
> IBM ". . . *was successful, in eliminating the leasing industry competition;*" (p. 11; emphasis supplied)
>
> IBM was shown to have "destroyed its 'distributor' competitors (non-manufacturing leasing companies)" (App., at p. 9a)

Greyhound's claims that "[s]ince early 1969, Greyhound has simply been unable to purchase IBM computers" and the like, may seem to describe what has in fact happened since the trial five years ago. They do not do so accurately, and hence, an explanation is needed to ensure that this Court does not draw an erroneous inference.

The additional facts, not in the record of this case since they have all occurred since the trial, stated briefly, are:

> (i) Greyhound Computer has since the trial acquired and currently has on order from IBM in excess of $150 million of IBM computers;
>
> (ii) Greyhound Computer is currently very much engaged in the sale and long and short term leasing of IBM computers. It regularly runs ads in the trade press like that appearing on the following page which make it plain that Greyhound Computer has not at all been "eliminated" (Br. Opp., at p. 2) from purchasing and leasing IBM computers.

Computerworld, December 12, 1977, p. 25*

*Greyhound has run the same or similar ads on a number of other recent occasions (*Computerworld* issues of: September 5, 1977, p. 22; September 19, 1977, p. 12; October 3, 1977, p. 12; November 28, 1977, p. S/11).